



Department of Energy
Acquisition Regulation

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ACQUISITION LETTER

This Acquisition Letter (AL) is issued by the Procurement Executive pursuant to a delegation from the Secretary and under the authority of the Department of Energy Acquisition Regulation (DEAR) Subpart 901.301-71.

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CONTENTS

CITATION

DEAR 970.27

TITLE

Patents, Data, and Copyrights

I. Purpose. The purpose of this AL is to provide policy guidance, and an implementing contract clause, governing data and computer software rights under those management and operating (M&O) contracts that include a technology transfer clause implementing the National Competitiveness Technology Transfer Act (NCTTA) of 1989 (Pub. L. 101-189).

II. Background. Among other things, the NCTTA establishes, as a national objective, the enhancement of the United States industrial base by applying the capabilities, technologies, and skills found in the Department of Energy's M&O contractor laboratories and facilities. To implement the objectives of the NCTTA, it is necessary to provide certain expanded rights regarding data and computer software to those M&O contractors participating, by virtue of their contract, in NCTTA technology transfer activities of the Department.

III. Guidance. The intent of DOE's revised data policy is to broaden the rights of M&O contractors to include copyright protection of technical data other than computer software. To implement this change in policy, the attached contract clause contains several significant differences from the "Rights in Technical Data-Facility" clause now prescribed in AL 88-1 for use in M&O contracts. The following changes are hereby made through the promulgation of the clause entitled "Rights in Data-Technology Transfer Activities," attached hereto:

A. The term "proprietary data" is no longer used. Instead, terms used in the Federal Acquisition Regulation, such as "limited

- (1) would be detrimental to national security;
- (2) would not enhance the appropriate transfer or dissemination and commercialization of such data;
- (3) would have a negative impact on U.S. industrial competitiveness;
- (4) would prevent DOE from meeting its obligations under treaties and international agreements; or,
- (5) would be detrimental to one or more of DOE's programs.

Decisions to withhold permission under paragraph (e)(1)(i)(B) shall be made by the DOE Patent Counsel assigned the responsibility for patent and data right matters under the contract.

I. Relationship to AL 88-1. The guidance set forth in AL 88-1 concerning rights in technical data, including the contract clause entitled "Rights in Technical Data-Facility (May 1988)," is hereby superseded for those contracts which include a technology transfer clause implementing NCTTA, but shall continue to apply to those M&O contracts (e.g., weapons production contracts) that do not include a technology transfer clause implementing NCTTA.

J. Implementation. Attachment I to this AL provides the contract clause "Rights in Data-Technology Transfer Activities (OCT 1991)," for use in M&O contracts having a technology transfer clause implementing NCTTA. Contracting Officers shall offer the clause, "Rights in Data-Technology Transfer Activities," to M&O contractors for inclusion in their contracts at the time a technology transfer clause is added to the M&O contract.

Contracts for the management and operation of DOE's Naval Reactors Programs are excluded from the requirements of this AL.

IV. Effective Date. This AL is effective on the date shown on page 1 of this AL.

V. Expiration Date. Unless cancelled or otherwise superseded, this AL will expire thirty (30) days after the date of publication of the final rule in the Federal Register implementing these changes in the DEAR.

RIGHTS IN DATA - TECHNOLOGY TRANSFER ACTIVITIES

(a) Definitions.

- (1) "Computer software," as used in this clause, means computer programs, computer data bases, and documentation thereof.
- (2) "Data," as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.
- (3) "Limited rights data," as used in this clause, means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.
- (4) "Technical data," as used in this clause, means data (other than computer software) which are of a scientific or technical nature.
- (5) "Restricted computer software," as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software; including minor modifications of such computer software.
- (6) "Unlimited rights," as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.
- (7) "Limited rights," as used in this clause, means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of paragraph (g) in this clause.
- (8) "Restricted rights," as used in this clause, means the rights of the Government in restricted computer software, including minor modifications of such computer software, as set forth in a Restricted Rights Notice of paragraph (h) in this clause.

- (v) The right to remove, cancel, correct, or ignore any markings not authorized by the terms of this Contract on any data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the Contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the Contractor of the action taken.

(2) The Contractor shall have:

- (i) The right to withhold its limited rights data and restricted computer software in accordance with the provisions of this clause;
- (ii) The right to use for its private purposes, subject to patent, security or other provisions of this Contract, data it first produces in the performance of this Contract, except for data in DOE's Uranium Enrichment Technology, including diffusion, centrifuge, and atomic vapor laser isotope separation, provided the data requirements of this Contract have been met as of the date of the private use of such data; and
- (iii) The right to assert copyright subsisting in scientific and technical articles as provided in paragraph (d) of this clause and the right to request permission to assert copyright in works subsisting in works other than scientific and technical articles as provided in paragraph (e) of this clause.

The Contractor agrees that for limited rights data or restricted computer software or other technical, business or financial data in the form of recorded information which it receives from, or is given access to by, DOE or a third party, including a DOE Contractor or subcontractor, and for technical data or computer software it first produces under this Contract which is authorized to be marked by DOE, the Contractor shall treat such data in accordance with any restrictive legend contained thereon.

Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

software first produced by the Contractor in performance of this Contract, where the Contractor can show that commercialization would be enhanced by such copyright protection, subject to the following:

(1) Contractor Request to Assert Copyright.

- (A) For data other than scientific and technical articles, the Contractor shall submit in writing to Patent Counsel its request to assert copyright in data first produced in the performance of this Contract pursuant to this clause. Each request by the Contractor to be complete must include: (1) the identity of the data (including any computer program) for which the Contractor requests permission to assert copyright, as well as an abstract which is descriptive of the data and is suitable for dissemination purposes, (2) the program under which it was funded, (3) whether the data is subject to an international treaty or agreement, (4) whether the data is subject to export control, (5) a statement that the Contractor plans to commercialize the data within five (5) years of obtaining permission to assert copyright, and (6) for data other than computer software, a statement explaining why the assertion of copyright is necessary to enhance commercialization. For data that is developed using other funding sources in addition to DOE funding, the permission to assert copyright in accordance with this clause must also be obtained by the Contractor from all other funding sources prior to the Contractor's request to Patent Counsel. The request shall include the Contractor's certification or other documentation acceptable to Patent Counsel demonstrating such permission has been obtained.
- (B) Permission for the Contractor to assert copyright in excepted categories of data as determined by DOE is expressly withheld. Such excepted categories include data whose release (1) would be detrimental to national security, i.e., involve classified information or data or sensitive information under Section 148 of the Atomic Energy Act of 1954, as amended, or are subject to export control for nonproliferation and other

either give or withhold DOE's permission for the Contractor to assert copyright or advise the Contractor that DOE needs additional time to respond and the reasons therefor.

(iii) Permission for Contractor to Assert Copyright.

- (A) For computer software, the Contractor shall furnish to the contractor designated by DOE to serve as the DOE centralized software distribution and control point, at the time permission to assert copyright is given under (ii) above: (1) an abstract describing the software suitable for publication, (2) the source code for each software program, and (3) the object code and at least the minimum support documentation needed by a technically competent user to understand and use the software. The Patent Counsel, for good cause shown by the Contractor, may allow the minimum support documentation to be delivered within 60 days after permission to assert copyright is given or at such time the minimum support documentation becomes available. The Contractor acknowledges that the above-identified DOE-designated contractor may provide a technical description of the software in an announcement identifying its availability from the copyright holder.
- (B) Unless otherwise directed by the Contracting Officer, for data other than computer software to which the Contractor has received permission to assert copyright under paragraph (ii) above, the Contractor shall within sixty (60) days of obtaining such permission furnish to DOE's Office of Scientific and Technical Information (OSTI) a copy of such data as well as an abstract of the data suitable for dissemination purposes. The Contractor acknowledges that OSTI may provide an abstract of the data in an announcement to DOE, its contractors and to the public identifying its availability from the copyright holder.
- (C) For a period of five (5) years beginning on the date the Contractor is given permission to assert copyright in data, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive,

IMPLIED, OR ASSUMES ANY LEGAL LIABILITY OR RESPONSIBILITY FOR THE ACCURACY, COMPLETENESS, OR USEFULNESS OF ANY INFORMATION, APPARATUS, PRODUCT, OR PROCESS DISCLOSED, OR REPRESENTS THAT ITS USE WOULD NOT INFRINGE PRIVATELY OWNED RIGHTS.

- (F) With respect to any data to which the Contractor has received permission to assert copyright, the DOE has the right, during the 5-year period set forth in subparagraph (e)(1)(i)(A) above, to request the Contractor to grant a nonexclusive, partially exclusive or exclusive license in any field of use to a responsible applicant(s) upon terms that are reasonable under the circumstances, and if the Contractor refuses such request, to grant such license itself, if the DOE determines that the Contractor has not made a satisfactory demonstration that either it or its licensee(s) is actively pursuing commercialization of the data as set forth in subparagraph (e)(1)(i)(A) above. Before licensing under this paragraph (F), DOE shall furnish the Contractor a written request for the Contractor to grant the stated license, and the Contractor shall be allowed thirty (30) days (or such longer period as may be authorized by the Contracting Officer for good cause shown in writing by the Contractor) after such notice to show cause why the license should not be granted. The Contractor shall have the right to appeal the decision of the DOE to grant the stated license to the Invention Licensing Appeal Board as set forth in 10 CFR 781.65 - "Appeals".
- (G) No costs shall be allowable for maintenance of copyrighted data, primarily for the benefit of the Contractor and/or a licensee and which exceeds DOE Program needs, except as expressly provided in writing by the Contracting Officer. The Contractor may use its net royalty income to effect such maintenance costs.
- (I) At any time the Contractor abandons commercialization activities for data for which the Contractor has received permission to assert copyright in accordance with this clause, it shall advise OSTI and Patent

LIMITED RIGHTS NOTICE

These data contain "limited rights data", furnished under Contract No. _____ with the United States Department of Energy (and Purchase Order/Subcontract No. _____ if applicable) which may be duplicated and used by the Government with the express limitations that the "limited rights data" may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Contractor, except that further disclosure or use may be made solely for the following purposes:

- (a) This "limited rights data" may be disclosed for evaluation purposes under the restriction that the "limited rights data" be retained in confidence and not be further disclosed;
- (b) This "limited rights data" may be disclosed to other Contractors participating in the Government's program of which this Contract is a part for information or use in connection with the work performed under their contracts and under the restriction that the "limited rights data" be retained in confidence and not be further disclosed; and
- (c) This "limited rights data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "limited rights data" be retained in confidence and not be further disclosed.

This Notice shall be marked on any reproduction of this data in whole or in part.

(END OF NOTICE)

(h) Rights in Restricted Computer Software.

(1) Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive paid-up license and right to use by or for the Government, any restricted computer software of the Contractor specifically used in the performance of this Contract, provided, however, that to the extent that any restricted computer software when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in

(2) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

RESTRICTED RIGHTS NOTICE--SHORT FORM

Use, reproduction, or disclosure is subject to restrictions set forth in the Long Form Notice of Contract No. _____ (subcontract No. _____ if appropriate) with _____ (name of Contractor or subcontractor).
(END OF NOTICE)

(3) If the software is embedded, or if it is commercially impractical to mark it with human readable text, then the symbol R and the clause date (mo/yr) in brackets or a box, a [R-mo/yr], may be used. This will be read to mean restricted computer software, subject to the rights of the Government as described in the Long Form Notice, in effect as of the date indicated next to the symbol. The symbol shall not be used to mark human readable material. In the event this Contract contains any variation to the rights in the Long Form Notice, then the contract number must also be cited.

(4) If restricted rights computer software is delivered with the copyright notice of 17 U.S.C. 401, the software will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions, with unlimited rights, unless the Contractor includes the following statement with such copyright notice: "Unpublished -- rights reserved under the Copyright Laws of the United States."